Bank of Commerce (M) Bhd v Chin Yet Sin

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2(S3)–24–830 OF 1998
KAMALANATHAN RATNAM J
23 AUGUST 2000

Civil Procedure *— Service — Foreign defendant — Defendant indicated to plaintiff that she was within jurisdiction — Substituted service — Whether plaintiff ought to have complied with O 6 r 6 of Rules of High Court 1980*

Civil Procedure *— Service — Substituted service — Foreign defendant — Defendant indicated to plaintiff that she was within jurisdiction — Whether plaintiff ought to have complied with O 6 r 6 of Rules of High Court 1980*

By way of an originating summons ('the OS'), the plaintiff applied for foreclosure proceedings against the defendant, a Singapore citizen. The defendant had sent two letters to the plaintiff stating a Kuala Lumpur address as her care of address, so the OS was effected at the address in Kuala Lumpur. The plaintiff's process server was informed that the defendant was at that time in Australia. The plaintiff subsequently sent a notice of demand to the defendant's Singapore address but the letter was returned with a remark on the envelope stating 'staying in Malaysia'. The plaintiff, being unable to effect personal service, applied for and obtained an order for substituted service. The defendant entered conditional appearance and then proceeded to set aside the order for substituted service. The senior assistant registrar ('the SAR') set aside the order granting the plaintiff leave to effect service by way of substituted service. The plaintiff appealed.

Held, allowing the appeal and setting aside the judgment of the SAR with costs:

The defendant in this case was deliberately attempting to avoid service. By merely stating that she was outside the jurisdiction, the defendant was aware of the rules requiring service outside jurisdiction. If the defendant was indeed residing in Singapore, it would have been normal for her to state her Singapore address in her letters addressed to the plaintiff in order to lend authenticity to her claim of residing outside the jurisdiction of the court. By her conduct and letters, the defendant had clearly indicated to the plaintiff that she was residing in Kuala Lumpur at the address given. The plaintiff had deliberately not proceeded pursuant to O 6 r 6 of the Rules of High Court 1980 as the plaintiff was satisfied that the defendant was residing in Kuala Lumpur (see pp 19G–H, 20A–B).

[**Bahasa Malaysia summary**

Melalui satu saman pemula ('SP tersebut'), plaintif memohon tindakan melelong terhadap defendan, seorang warganegara

Singapura. Defendan telah mengirim dua pucuk surat kepada plaintif menyatakan satu alamat Kuala Lumpur sebagai alamat 'care of', oleh itu SP tersebut disampaikan ke alamat di Kuala Lumpur. Penghantar saman plaintif diberitahu bahawa defendan pada ketika itu berada di Australia. Plaintif kemudiannya menyampaikan notis tuntutan ke alamat defendan di Singapura tetapi surat tersebut dipulangkan dengan komen pada sampul surat menyatakan 'menetap di Malaysia'. Plaintif, kerana tidak dapat melaksanakan penyampaian peribadi, memohon dan memperolehi perintah penyampaian ganti. Defendan memasukkan kehadiran bersyarat dan cuba mengetepikan perintah penyampaian ganti. Penolong kanan pendaftar ('PKP') mengetepikan perintah yang mengizinkan plaintif kebenaran melaksanakan penyampaian ganti. Plaintif merayu.

Diputuskan, membenarkan rayuan tersebut dan mengetepikan penghakiman PKP tersebut dengan kos:
Defendan dalam kes ini secara sengaja cuba mengelak penyampaian. Dengan hanya menyatakan bahawa beliau berada di luar bidang kuasa, defendan sedar akan peraturan mewajibkan penyampaian di luar bidang kuasa. Sekiranya defendan benar-benar bermastautin di Singapura, ia mungkin perkara biasa baginya menyatakan alamat Singapuranya dalam surat-suratnya yang dialamatkan kepada plaintif untuk memberi keesahan kepada dakwaannya bahawa beliau menetap di luar bidang kuasa mahkamah. Melalui tingkahlaku dan surat-suratnya, defendan jelas menunjukkan kepada plaintif bahawa beliau bermastautin di Kuala Lumpur di alamat yang diberikan. Plaintif sengaja tidak memulakan prosiding menurut O 6 r 6 Kaedah-Kaedah Mahkamah Tinggi 1980 kerana plaintif berpuashati bahawa defendan bermastautin di Kuala Lumpur (lihat ms 19G–H, 20A–B).]

Notes

For cases on foreign defendant, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4082–4084.

For cases on substituted service, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4141–4154.

Legislation referred to

Rules of the High Court 1980 O 6 r 6

Sa Ponmugam (*Ponmugam & Co*) for the appellant/plaintiff.
CH Foong (*LC Chong & Co*) for the respondent/defendant.

Kamanalathan Ratnam J:

Facts

The plaintiff applied, by way of originating summons ('the OS'), for foreclosure proceedings against the defendant. Being unable to effect

A personal service, the plaintiff applied for and obtained on 11 December 1998 an order for service by way of substituted service. Having entered conditional appearance, the defendant applied by way of encl 17, to set aside the said order. Having heard the arguments the learned senior assistant registrar ('the SAR') set aside the order granting the plaintiff leave to effect service by way of substituted service, on 28 September 1999. This
B is the plaintiff's appeal against that order.

Findings of the court

Since there is no complaint with regard to the substituted service proper, I
C shall deal straightaway with the defendant's complaint which is that since she is a Singapore citizen whose Singapore address has been stated in the annexure to the charge, the plaintiff ought to have issued the OS in compliance with O 6 r 6 of the Rules of the High Court 1980 ('the RHC') which requires the plaintiff to obtain leave of the court before issue, if the said writ notice is to be served out of jurisdiction. The defendant argued
D that in the circumstances the OS herein is invalid and should be set aside. The defendant further argued that since service was effected at an address in Kuala Lumpur, namely, at No 5–40, 5th Floor, Wisma Central, Jalan Ampang, Kuala Lumpur ('the Kuala Lumpur address'), this was contrary to the specific provisions of the charge documents which contained the Singapore address. The defendant also argued that since the plaintiff's
E process server was informed by the occupant of the Kuala Lumpur address when the former went to the said Kuala Lumpur address to effect service, that the defendant was not at the said premises, but was at that time in Australia, and since the said occupant had also affirmed an affidavit to that effect, the plaintiff could not claim effective service upon the defendant.

F On the other hand, the plaintiff has exhibited two letters dated 24 September 1996 and 30 September 1996 from the defendant and addressed to the plaintiff, wherein the defendant had stated her address, as care of the Kuala Lumpur address. Although in the letter dated 24 September 1996 the defendant had stated in the first paragraph that she is 'now resident outside jurisdiction', I am convinced that the defendant was
G deliberately attempting to evade service. After all if the defendant's address was as stated in the charge documents, namely, the Singapore address, then I find it rather puzzling why the defendant did not use that same address as her correspondence address in the said two letters. Further, by merely stating that she was outside the jurisdiction the defendant was clearly aware of the rules requiring service outside jurisdiction. After all if the defendant
H was indeed residing in Singapore, it would have been perfectly normal for her to have stated her Singapore address in the said two letters to lend authenticity to her claim of residing outside the jurisdiction of this court .

The defendant in fact was the guarantor of the loan which was given to one Hexxon Grapfic Sdn Bhd ('the company'). The plaintiff's solicitors
I sent a notice of demand to the said company. At the same time a copy of the said notice of demand was also sent to the defendant's Singapore address as stated in the annexure to the charge. The said letter was returned

with a remark written on the envelope 'staying in Malaysia'. A photostat copy of the envelope was exhibited to the plaintiff's affidavit in support of the application. By her conduct and letters the defendant had clearly indicated to the plaintiff that she was residing in Kuala Lumpur at the address given.

To my mind, the plaintiff had deliberately not proceeded pursuant to O 6 r 6 of the RHC because the plaintiff was satisfied that the defendant was residing in Kuala Lumpur. The occupant of the Kuala Lumpur address merely said that the defendant was not at the said premises as she was in Australia. The said occupant did not aver that the defendant was not residing at the Kuala Lumpur address. He merely said 'defendan tidak berada di premis tersebut dan sebaliknya berada di luar bidang kuasa iaitu di Australia'. Since the defendant herself maintains that she is residing in Singapore, there is no explanation as to whether she was on holiday in Australia. In any case, she could not be residing in Australia.

I am satisfied that the defendant had deliberately been avoiding service of process. I therefore allowed the appeal and set aside the judgment of the learned SAR given on 28 September 1999 with costs to the appellant.

Appeal allowed and judgment of the SAR set aside with costs.

Reported by Anitha MI Raman